DR. PARAMSOTHY MURUGASU

v.

UNIVERSITY OF MALAYA

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL RAZAK J
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 165 OF 1982]
21 DECEMBER 1982

LABOUR LAW: *Employment - Terms and conditions of contract - Appointment subject to 3 years' probationary period - Other conditions contained in letter of offer - Service Circular, issued after date of appointment, to pass Peperiksaan Am Kerajaan in addition to any other examination - Prerequisite for confirmation - Whether Service Circular invalid and conflicts with the terms and conditions of contract of employment - Whether in violation of the Constitution of University - Whether the Service Circular imposes a new condition of service and amounts to an unilateral variation of the contract.*

The appellant was appointed a lecturer in the Radiology Department in the Faculty of Medicine, University of Malaya on 22 August 1978 by a letter of offer dated 18 May 1978. The letter of offer expressly sets out a number of conditions, the first being that the appointment offered was permanent and pensionable subject to a probationary period of 3 years. Conditions (ii) & (ix) of the letter were very material for the purpose of this appeal. They were:

> (ii) subject to satisfactory service, passing the prescribed examinations and fulfilling other relevant conditions you shall be eligible to be considered for confirmation in your appointment at the end of this period.
>
> (ix) You shall at all times, be subjected to the Constitution of the University of Malaya, Statutes, Acts and Regulations in force in the University of Malaya. Amendments and Adaptations to these regulations and practices may, from time to time, be made by the Council of the University of Malaya.

However, the University Council in a policy decision passed a resolution requiring all officers in Groups A & B (appellant was in Group A) who were still on probation on or after 1 January 1978 to pass the *Peperiksaan Am Kerajaan* in addition to any other examination as a prerequisite for confirmation in their posts. The resolution was contained in Service Circular UM No. 2/1978 dated 9 October 1978. The respondent's letter of offer did not stipulate the prescribed examinations which the appellant had to pass to be eligible for the requirement of passing the *Peperiksaan Am Kerajaan*.

On 27 February 1982, the appellant filed a writ seeking a declaration and an injunction to restrain the University from implementing the Service Circular on the ground that it was invalid and conflicts with the terms and conditions of his contract of employment and was also in violation of s. 45(3)(b) of the Constitution of the University. It was the contention of the appellant in the Federal Court as well in the High Court that the Service Circular which had imposed a new condition of service requiring the appellant to sit for the *Peperiksaan Am Kerajaan* was invalid as it amounted to an unilateral variation of his contract of employment. It was argued on behalf of the appellant that in the absence of provisions relating to what were the "prescribed examinations", condition (ii) was not free from ambiguity and as such the learned Judge had erred when he failed to apply

the *contra proferentem* rule against the University. Whereas the respondent argued that the phrase passing the "prescribed examinations" was not in itself ambiguous because in the absence as to what the "prescribed examinations" were in the contract, reference had to be made to the Constitution of the University and in particular, s. 45 (3)(b) of the Constitution which had set out the appropriate prescribing authority, meaning that examinations will be prescribed by the Council.

This appeal was against the decision of the High Court (Hashim Yeop A. Sani J) [CLJ [1982] p. 434], which dismissed the appellant's suit for the declaration sought for as above.

Held:

[1] The respondent was correct in contending that the phrase passing the "prescribed examination" was not in itself ambiguous because in the absence as to what the "prescribed examinations" were in the contract, reference had to be made to the Constitution of the University. The phrase "prescribed examinations" did not introduce uncertainty into the contract.

[2] The Service Circular was not tailored only for the appellant, but applied to all staff in Groups A and B. The decision of the University Council was inescapably one which was made in exercise of the powers conferred by the Constitution of the University even if the occasion for its exercise arose as a result of a contractual arrangement.

[3] The Service Circular was valid and did not amount to a unilateral variation of the appellant's contract of employment.

[4] The appeal was accordingly dismissed with costs and the deposit lodged as security was ordered to be paid out to the respondent to account of its costs.

[Appeal dismissed with costs.]

Cases referred to:

Cowey v. Liberian Operations, Limited [1966] 2 Lloyds Rep 45
John Lee & Son (Grantham) Ltd. v. Railway Executive [1949] 2 All ER. 581
Kong Ming Bank Bhd. v. Leong Ho Yuen [1982] 2 MLJ 111

Other sources referred to:

Chitty on Contracts, 24 Edn., Vol. 1, para. 1376
Halsbury's Laws 4th Edn. Vol. 12 para 1473

For the appellant - C. Abraham (S. Radha Krishnan with him); M/s. Shearn Delamore & Co.
For the respondent - C. V. Das; M/s. Shook Lin & Bok

JUDGMENT

Raja Azlan Shah LP:

The appellant was appointed a lecturer in the Radiology Department in the Faculty of Medicine, University of Malaya ('the University') on 22 August 1978 in pursuance of a letter of offer dated 18 May 1978. The letter of offer expressly sets out a number of conditions. The first condition was that the appointment offered was permanent and pensionable subject to a probationary period of 3 years. Two other conditions are very material for the purpose of this appeal and we reproduce them below:

> (ii) subject to satisfactory service, passing the prescribed examinations and fulfilling other relevant conditions you shall be eligible to be considered for confirmation in your appointment at the end of this period.

(ix) You shall at all times, be subjected to the Constitution of the University of Malaya, Statutes, Acts and Regulations in force in the University of Malaya. Amendments and Adaptations to these regulations and practices may, from time to time, be made by the Council of the University of Malaya.

The University Council in a policy decision passed a resolution requiring all officers in Group A and B (appellant is in Group A) who are still on probation on or after 1 January 1978 to pass the *Peperiksaan Am Kerajaan* in addition to any other examination as a pre-requisite for confirmation in their posts. The resolution is contained in Service Circular UM No. 2/1978 ('Service Circular') dated 9 October 1978.

The respondent's letter of offer did not stipulate the prescribed examinations which the appellant had to pass to be eligible for confirmation. It certainly did not contain the requirement of passing the *Peperiksaan Am Kerajaan*.

Without going into unnecessary detail the appellant filed a writ on 27 February 1982 seeking a declaration and an injunction to restrain the University from implementing the Service Circular on the ground that it is invalid and conflicts with the terms and conditions of his contract of employment and is also in violation of s. 45(3)(b) of the Constitution of the University.

It is the contention of the appellant before us as well in the High Court that the Service Circular which imposed a new condition of service requiring the appellant to sit for the *Peperiksaan Am Kerajaan* was invalid as it amounted to an unilateral variation of his contract of employment. It is said that on the authority of *Cowey v. Liberian Operations, Limited* [1966] 2 Lloyds Rep 45 the University could not impose a new condition of service unless it terminates the existing employment providing for the new condition, or, alternatively, the appellant had agreed formally to a variation of the existing contract of employment, neither of which applied in this case. In that case the common law requirement of giving 3 months' notice to terminate a contract of employment was unilaterally substituted with a month's notice and it was held to be invalid. (See also *Chitty on Contracts*, 24 Edn. Vol. 1, para. 1376).

The issue therefore is whether there was a variation.

The learned Judge held that the Service Circular did not impose an additional condition outside the terms of the contract of employment and therefore did not constitute a unilateral variation. He was of the view that by virtue of condition (ii) of the letter of offer it was within the power of the Council to prescribe from time to time examinations to be passed. He also held that the Service Circular was not *ultra vires* s. 45(3)(b) of the Constitution of the University. Since there were no Statutes, Acts or Regulations in force on the date of appointment of the appellant, there was no restriction whatsoever in the power of the Council to issue the Service Circular.

In our view, the appeal turns, in part, on a consideration of the provisions of the Constitution of the University.

The powers of the University are contained in s. 4 of its Constitution. Para. (b) of subsection (1) thereof gives power to the University to regulate the conditions of service of its staff, including schemes of service, salary scales, leave and disputes. Section 16 provides that the executive body of the University shall be the Council and the Council may exercise all the powers conferred on the University as contained in s. 4. Section 25 provides for the making of statutes dealing with the methods of appointment and the

conditions of service of officers and teachers. Section 45 deals with the provisions relating to the appointments of teachers and employees. As the crux of the case turns on the construction of s. 45(3)(b) we set it out in full:

> 45. (3) Every person employed by the University shall hold office on such terms and conditions as may be prescribed by the Council and the terms and conditions to be so prescribed shall be deemed to include a provision -
>
> (b) in relation to all other terms and conditions of service that his employment is subject to the provisions of this Constitution and to the provisions of all Statutes, Acts and Regulations in force on the date of the commencement of his employment.

A number of statutes have been made by the Council in the exercise of the powers conferred by s. 4(1) for example Statute X (New Series) relating to the Appointment of Salary Group A Employees, but none has been made in respect of the matter referred to in para. (n) of s. 4(1) in regard to conditions of service relating to "prescribed examinations" expressed in condition (ii) of the letter of offer.

In the absence of provisions relating to what are the 'prescribed examinations" it was argued that condition (ii) is not free from ambiguity and as such the learned Judge erred when he failed to apply the *contra proferentem* rule against the University [see *John Lee & Son (Grantham) Ltd. v. Railway Executive* [1949] 2 All ER 581, 583; *Kong Ming Bank Bhd. v. Leong Ho Yuen* [1982] 2 MLJ 111; *Halsbury's Laws* 4th Edn. Vol. 12 para 1473]. On behalf of the University it was argued that the phrase passing the "prescribed examinations" is not in itself ambiguous because in the absence as to what the "prescribed examinations" are in the contract, reference is to be made to the Constitution of the University and in particular, s. 45(3) (b) of the Constitution which sets out the appropriate prescribing authority. It would mean that examinations will be prescribed by the Council.

We are satisfied that the respondent's contention is correct. The phrase "prescribed examinations" does not introduce uncertainty into the contract.

Therefore, the answer to these opposing contentions must depend on a consideration of the Constitution of the University. The power exercised by the Council, as the executive authority of the University, in appointing the appellant, was that conferred on it by s. 45(3)(b). It consists of two limbs. Firstly, the appointment of the appellant was made subject to "such terms and conditions **as may be prescribed"** (Emphasis is mine) by the Council. Secondly, such terms and conditions to be so prescribed **shall be deemed** (Emphasis is mine) to include a provision that the appellant's employment is subject to the provisions of the Constitution, Statutes, Acts and Regulations in force on the date of the appointment. With regard to the second limb of the provision, it is common ground that no Statute, Act or Regulation has been made by the Council pursuant to s. 4(1)(n) of the Constitution defining or regulating "prescribed examinations" for the purposes of the conditions of service. There is accordingly still left for consideration the first limb of that provision which expressly provides for "such terms and conditions as may be prescribed by the Council". A consideration of the statutory provision clearly emphasizes its potentially broad scope in its application where "prescribed examinations" (in the plural, it will be noted,) are otherwise undefined. It should, in our view, consistent with its language, be given a broad as opposed to a narrow construction and one which will serve to achieve the broad objects and purposes Parliament intended.

When the Council resolved to issue the Service Circular, the question before it, in our opinion, went far beyond the circumstances of the appellant, and involved as well the exercise of the powers conferred on it under the Constitution of the University as its

governing authority. The argument that in issuing the Service Circular the Council was merely acting under (but beyond) the conditions of the appellant's contract of employment and not under its basic statute as well cannot be supported. The service Circular was not tailored only for the appellant, but applied to all staff in Groups A and B. In our opinion the decision was inescapably one which was made in exercise of the powers conferred by the Constitution of the University even if the occasion for its exercise arose as a result of a contractual arrangement.

We therefore hold that the Service Circular was valid and did not amount to a unilateral variation of the appellant's contract of employment.

The argument that the Council's resolution containing a new condition of employment relating to the requirement to pass the *Peperiksaan Am Kerajaan* must only be implemented by Statute, Act or Regulation and not by a Service Circular is in our opinion to confuse form with substance. We see no reason in principle why the Council could not implement its resolution by way of a Service Circular.

The appeal is accordingly dismissed with costs. We direct the deposit lodged as security to be paid out to the respondent to account of its costs.

Also found at [1983] 1 CLJ 238